In The

Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-684

W. J. ESTELLE,

Petitioner,

v.

ROBERT VERNON BRUCE,

Respondent.

Petition for Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

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Respondent.

Petition for Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

The petitioner, W. J. Estelle, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 9, 1976.

OPINION BELOW

Following a fact-finding hearing on November 1, 1974, a written opinion was rendered by Judge Eldon B. Mahon for the United States District Court, Northern District of Texas, and is included as an appendix to this petition. On appeal from the order of Judge Mahon, a written opinion was rendered by Circuit Judge Clark, United States Court of Appeals, Fifth Circuit, and is found at 536 F.2d 1051 (1976).

JURISDICTION

The jurisdiction of this Court is invoked through the provisions of Title 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether an appellate court will be allowed to substitute its judgment as to the quality and credibility of witnesses for that of the trial court as fact-finder under the guise of the "clearly erroneous rule".

2. Whether the overbroad and indistinct concept of the "clearly erroneous rule" the decision below found necessary to justify its position should be narrowed to reasonable and manageable limits.

STATUTES

The primary question revolves around the provisions of Rule 52(a), F.R.C.P.

STATEMENT OF THE CASE

The factual history of this "far from routine" case is set out in some detail in Circuit Judge Clark's opinion in *Bruce v. Estelle*, 536 F.2d 1051 (1976), and does not require restatement.

Essentially, Mr. Bruce murdered his wife in 1964, was adjudged "mentally ill" and committed to Terrell State Hospital in 1965, was released that same year by a bogus psychiatrist, was then indicted for murder by a grand jury and was convicted at trial on an accident defense. He applied for writ of habeas corpus to the Texas Court of Criminal Appeals, was denied relief, appealed to the Federal District Court and was again denied relief. The Fifth Circuit vacated this order and remanded the cause for application to the state convicting court under Article 11.07, Texas Code of Criminal Procedure. The state convicting court "empaneled an

advisory jury and conducted an extensive evidentiary hearing in 1969." 536 F.2d at 1054. This jury made findings adverse to Mr. Bruce and he returned to the Federal courts. After a District Judge affirmed the state court findings the Fifth Circuit reversed and ordered the Federal District Court to conduct a hearing to resolve the following questions:

> 1. Whether a meaningful determination can presently be made as to Mr. Bruce's mental competence to stand trial in 1965, and if so:
>
> 2. Whether, at the time of the trial in 1965, Mr. Bruce had sufficient ability to consult with his lawyer with a reasonable degree of rational understanding; and whether he had a rational as well as a factual understanding of the proceedings against him.

The District Court answered both of the foregoing questions in the affirmative and Mr. Bruce again appealed to the Fifth Circuit. In reversing, Circuit Judge Clark's opinion agreed with Judge Mahon that a retrospective determination of mental competence may be made, but then rejected the Court's factual determination, that Mr. Bruce was competent at his earlier trial, as "clearly erroneous". It is from this application of the "clearly erroneous rule" that this petition arises.

REASONS FOR GRANTING THE WRIT

1. The decision below misapplied the "clearly erroneous rule" in seeking to justify the substitution of its judgment for that of the United States District Judge as trier of fact.

Citing *Drope v. Missouri*, 420 U.S. 162, 174, 95 S.Ct. 896, 905, 43 L.Ed.2d 103 (1975), *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), and *United States v. Makris*, 535 F.2d 899, 906 (1976), the decision below accurately found that "Bruce had the burden of proving that he was most probably incompetent at the time of his 1965 trial." The test in determining

whether he fulfilled this burden was whether he had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a rational as well as a factual understanding of the proceedings against him. *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). This standard is not so stringent as to preclude one "suffering from a mental disease which is at the root of antisocial action" from being fully competent to stand trial. *Lee v. Alabama,* 406 F.2d 466 (1969). Once this factual determination is made by a District Court, it is subject to the provisions of Rule 52(a), F.R.C.P. and will not be set aside on appeal unless clearly erroneous. *Lee v. Alabama,* supra, and *Carroll v. Beto,* 446 F.2d 648 (1971).

In light of the depth and quality of Judge Mahon's opinion, it can only be concluded that the decision below defined this "clearly erroneous rule" as: where x number of witnesses testify for party A and y number of witnesses testify for party B, and x is a larger number than y, then party A wins.

In order to fully comprehend this concept it is necessary to first carefully read and consider the opinion of Judge Mahon discussing the extensive psychiatric testimony and making findings of fact concerning disputes in that testimony. (This opinion is attached as an appendix to the petition.) The decision below examines the same testimony and reaches a different conclusion by inserting itself into the role of fact-finder and judging the quality and credibility of witnesses. Petitioner could not hope to do justice to Judge Mahon's opinion by summarizing or attempting to discuss it. Instead, this Court is urged to read it in its entirety in order to fully realize its careful wisdom.

But to go beyond the purely psychiatric testimony, there is also that of Hugh Snodgrass, Mr. Bruce's lawyer at the 1965 trial. Mr. Snodgrass testified, at the 1969 hearing, that it was his belief that

Mr. Bruce was able to assist him in conducting his defense. (1969 Transcript, Pages 125-126). He further testified that he and Mr. Bruce were in continual communication during the cross-examination of witnesses. (1969 Transcript, Page 126). It should be remembered that Mr. Snodgrass was the only witness throughout any of the proceedings over the last ten years who was in close contact with Mr. Bruce during the 1965 trial and who had the best opportunity to observe him. Mr. Snodgrass' testimony is brought into sharper focus by reference to his affidavit which was incorporated in the record of the 1969 hearing and which appears in this record in Volume 4A, Pages 30-31. (The page numbers referred to appear at the lower right-hand corner of the legal size pages attached to the Transcript of the 1969 hearing.) There, Mr. Snodgrass sets out the pre-trial planning of trial strategy between himself, Mr. Bruce, and Mr. Bruce's father:

> ". . . Vernon Bruce, the father of Robert Bruce, agreed with counsel *as did the defendant Robert Bruce as a matter of trial strategy and tactics* that in the event we did plead the defense of accident as contended by the defendant Robert Bruce that we should not plead in the alternative insanity, as such pleas would have been incompatible and inconsistent and at the time of determining this, *we felt that any punishment assessed with inconsistent pleas would probably be increased in the event the jury rejected both."* (emphasis added; R. Volume 4A, Page 30).

This is highly persuasive evidence that Mr. Bruce was rational and able to assist in his defense and in the planning of it.

The record further reflects that, having decided upon the defense of accident, Mr. Bruce proceeded to present such a defense throughout his trial, and all during his extensive testimony he never once wavered from it (1965 Transcript, Pages 46-90). A fair reading of his trial testimony supports the conclusion that he was a man with a rational as well as factual understanding of the proceedings against him. His testimony

upon vigorous cross-examination is particularly illustrative of his understanding of the proceedings. (1965 Transcript, Pages 64-85; 89-90). All throughout cross-examination, Mr. Bruce maintained his defense of accident and did an excellent job of handling the prosecutor's questions, just one example of which is the following colloquy appearing in the 1965 transcript, beginning at Page 73, Line 16 through Page 74, Line 20:

> "Q All right, did you tell the grand jury that you had not bought a gun for several weeks?
>
> A. I told them I hadn't bought a gun.
>
> Q. You told them you didn't buy a gun on December the 16th, didn't you?
>
> A. I don't remember whether I did or not.
>
> Q. Well, is that true or untrue?
>
> A. Seems to me that he worded the question, you bought a gun to kill your wife on December the 12th.
>
> Q. All right, wasn't the question, 'You haven't bought a gun on December the 16th' and your answer, 'No. Sir.' "
>
> A. He said December the 12th, if I remember.
>
> Q. Oh, well, you have got to be real technical. If the question were asked you if you killed her right then, you might say it was a couple of minutes later.
>
> THE COURT: Don't argue with the witness. You have got a right to read the question and the answers if you are using it for the purpose of impeachment.
>
> Q. (continuing) Then, did you say that you had not bought any gun previously for the last few weeks and your answer was, 'No, sir.' "
>
> A. I think so.
>
> Q. All right.
>
> A. I don't know whether he said that or not, you have the testimony there.
>
> Q. All right, I am reading from it then, the question was,

> 'You did not return a gun to a man and tell him that you intended to kill your wife with it.' "
>
> A. That is a double question. I returned a gun but I didn't say anything about killing my wife with it."

The foregoing is simply not the testimony of a man deprived of a rational and factual understanding of the proceedings against him.

The outbursts made by Mr. Bruce at his 1965 trial, upon which Dr. Cannon placed much reliance in reaching her conclusion that he was then incompetent, take on less significance when viewed in the context of the entire trial. Mr. Bruce and Mr. Snodgrass had decided to rely on the defense of accident. Mr. Bruce's daughter was the State's first witness, and began her testimony in an apparently composed manner. (1965 Transcript, Pages 2-4). When she reached the point in her testimony about her mother's threat to have him hospitalized, Mr. Bruce made the following outburst:

> "THE DEFENDANT: Suzie, she never said that.
>
> THE COURT: Sit down and be quiet.
>
> THE DEFENDANT: Why, hells bells, man." (1965 Transcript, Page 5).

His only other outburst was made a few seconds later:

> "THE DEFENDANT: Tell the truth, Suzie." (1965 Transcript, Page 6).

The foregoing comprise all of the outbursts relied on by Dr. Cannon in reaching her conclusion that he was incompetent; there were no others. When admonished by the Judge, Mr. Bruce said:

> "THE DEFENDANT: I'll keep quiet, Your Honor, I promise to do that." (1965 Transcript, Page 6).

He was true to his word, and made no further outbursts. This was ample evidence upon which a fact-finder could conclude that

Mr. Bruce's apparent anguish was, in fact, indicative of a great degree of understanding of what was occurring. This record suggests that he understood that his daughter's testimony, if allowed to continue, was going to leave his defense of accident in a shambles. It is significant to note that, after his outbursts, the child was thereafter unable to testify to anything concerning her mother's death except in monosyllables and nods of her head; she was effectively destroyed as a witness against him. This in itself indicates that Mr. Bruce's outbursts were not the acts of an irrational man, but were calculated and deliberate acts done in furtherance of his accident defense.

Further, it is doubtful that a day goes by without there occurring throughout the country emotion laden trials complete with similar outbursts. If, every time such occurred, the defendant was declared incompetent to stand trial, it would become somewhat difficult to convict any criminal.

There then arises the very important question of the application of the *Dusky* standard to the trial of this particular offense and defense. The offense being murder by shooting, and the defense being accident, the only issue at trial was whether the pulling of the trigger was accidental or intentional. The ability to assist counsel, then, is a much simpler task than that involved in, for instance, a complex embezzlement trial. Mr. Bruce's testimony, taken alone, is sufficient to demonstrate a rational as well as factual understanding of both the proceedings against him and, further, of what was necessary of him in establishing his defense. The statement of Mr. Snodgrass clearly demonstrates not only Mr. Bruce's ability for the requisite consultation but, in fact, the existence of such consultation. The question never answered through ten years of appellate proceedings is what more could Mr. Bruce have done to assist his counsel than he in fact did?

2. The decision below has left jurisprudence with an overbroad and indistinct concept of the "clearly erroneous rule".

Assuming, as apparently the decision below did, that a state "clearly erroneous rule" and the Federal "clearly erroneous rule" are functional equivalents, then the application of the rule in the instant case should be consistent with its application in *Lee v. Alabama,* supra, *Carroll v. Beto,* supra, and *Drope v. Missouri,* supra.

In both *Lee v. Alabama* and *Carroll v. Beto* a specific evidentiary hearing had been held on the issue of competency and the fact-finder's decision was supported by a body of evidence. Thus, the application of the statutory policy of restraint and the appellate decision that the trial court finding was not clearly erroneous.

In *Drope v. Missouri,* there had been no such evidentiary hearing; there was no body of supporting evidence for the fact-finder; and, in fact, "there was no opinion evidence as to petitioner's competence to stand trial." 43 L.Ed.2d at Page 118. Consequently, this Court applied the "rule" and reversed.

As in *Lee v. Alabama* and *Carroll v. Beto,* the instant case has a record of an evidentiary hearing on the specific issue of competence and a large volume of evidence to support the fact-finder's decision. But, instead of applying the same consistent restraint, the decision below insists on availing itself of the "clearly erroneous rule" as though it were a *Drope v. Missouri* no evidence situation.

The result is to throw into confusion any logical attempt at application of the rule and to render meaningless any attempt to define the term or set parameters upon its coverage.

CONCLUSION

Upon direction of the Fifth Circuit, the Federal District Court held an evidentiary hearing on the specific issue of competency. In an attempt to carry his burden, Mr. Bruce presented evidence of his incompetency at the time of his 1965 trial. Petitioner responded with evidence that Mr. Bruce was fully competent to stand trial for the murder of his wife. The Federal District Judge, as fact-finder, arrived at the well-reasoned conclusion that Mr. Bruce had not satisfied his burden and that he was indeed competent under the *Dusky* standard. The Fifth Circuit chose to disagree with the fact-finder and, in so doing, managed to scramble all consistent thought in the application of the "clearly erroneous rule" provision of Rule 52(a), F.R.C.P.

The only means of effectively providing consistency and meaning to this procedural concept is for this Court to grant the instant petition and reinstate the fact-finder's original opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ronald D. Hinds, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served copies of the foregoing Petition for Writ of Certiorari on counsel for Respondent, by depositing same in the United States Mail, first-class postage prepaid, on this the _____ day of November, 1976, addressed to Morris I. Jamme, James S. Pleasant, 1000 LTV Tower, Dallas, Texas, 75201; Michael Anthony Maness, 5959 West Loop South, Suite 606, Bellaire, Texas, 77401; and Timothy A. Duffy, 2001 Bryan Tower, Dallas, Texas, 75201, as counsel of record for Respondent.

Original Signed By
RONALD D. HINDS

Ronald D. Hinds

In The
UNITED STATES DISTRICT COURT
For the Northern District of Texas
Dallas Division
Civil Action No. CA 3-5368-E

ROBERT V. BRUCE
v.
W. J. ESTELLE, Director, TDC

ORDER

Petitioner, Robert Bruce, challenges his conviction for the murder of his wife, alleging his incompetency to stand trial in September 1965. The matter is now before this Court on remand, pursuant to the Fifth Circuit's Order in *Bruce v. Estelle,* 483 F.2d 1031 (5th Cir. 1973). The rather unusual circumstances surrounding this entire matter are more fully developed therein and need not be repeated here. A hearing was held on November 1, 1974, on the two issues before the Court, to wit:

1. Whether a meaningful hearing on the petitioner's mental competency to stand trial in late September 1965 could presently be held by the Court;
2. If such meaningful hearing could in fact be held now, then was petitioner mentally competent under the standards enunciated in *Dusky v. United States,* 362 U.S. 462 (1960) to stand trial in September 1965 for the alleged murder with malice of his wife.

Petitioner, Robert Vernon Bruce, is in the custody of the Respondent pursuant.o the judgment and sentence of Criminal District Court, Dallas County, Texas, in State Cause No. F-1020-H for the offense of murder with malice. He was convicted on his plea of not guilty on September 21, 1965, and formally sentenced

October 28, 1965, to life imprisonment. His conviction was affirmed April 27, 1966. *Bruce v. State*, 402 S.W. 2d 919 (Tex. Crim. App. 1966). Petitioner has exhausted his state remedies on the issues involved here pursuant to Art. 11.07, Tex. Code Crim. Proc. Ann. The state application on these issues was State Writ No. 36-H which was recommended to be denied by the state convicting court and was ultimately denied by the Texas Court of Criminal Appeals without written order January 14, 1971. Appellate No. 1758. Petitioner and his attorneys, including counsel appointed by this Court and other counsel appearing at the petitioner's request, were present with the petitioner as well as counsel for the respondent. Testimony was received from two qualified psychiatrists who had previously submitted written reports of their respective examinations of the petitioner.[1] The entire record of the state court proceedings is before the Court. If a meaningful hearing can be held at this time, the burden is of course, on petitioner to show by clear and convincing evidence that he was incompetent at the time of his 1965 state court trial. *Bruce v. Estelle, supra* at 1043.

Initially, I conclude that a meaningful hearing can be held on the issue of petitioner's mental competency at the time of the 1965 trial. Dr. Grigson's testimony on this point was clear and convincing. Additionally, Dr. Cannon conceded that such a meaningful hearing was possible at this time if medical and lay testimony in the various court records pertaining to petitioner's

[1] *Both psychiatrists were appointed by the Court.* James P. Grigson, M.D., was initially appointed. His report is dated February 5, 1974, and was filed February 14, 1974 (hereinafter "Dr. Grigson's Report"). Subsequently, after petitioner made known his disatisfaction with Dr. Grigson, Mary L. Cannon, M.D., was appointed to further examine petitioner. Her report is dated October 12, 1974 and was filed October 18, 1974 (hereinafter "Dr. Cannon's Report"). The seemingly long period of time between the two examinations resulted in part from petitioner's refusal to be examined by Dr. Cannon. *See* Footnote 3, *infra*.

mental condition at various dates was used in a manner similar to the way physician's records are used in ascertaining a patient's medical and mental condition. If this is done and current mental examinations are conducted, then Dr. Cannon concludes it is possible to render accurate medical opinions. I find that such lay and medical testimony, as well as the entire record in this matter was utilized by both Drs. Cannon and Grigson and that consequently a meaningful hearing is possible at the present time. *McGarrity v. Beto*, 335 F.Supp. 1186, 1194 (S.D. Tex.) aff'd, 452 F.2d 1206 (5th Cir. 1971); *Carroll v. Beto*, 330 F.Supp. 71 (N.D. Tex.) aff'd, 446 F.2d 648 (5th Cir. 1971).[2] In a hearing of this nature, the Court is to ascertain:

> ". . . whether [the accused] has sufficient ability [before and during his trial] to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 462, 4 L.Ed.2d 824, 825 (1960).

Conflicting medical testimony was presented. Dr. Cannon, upon her examination of petitioner and review of the other records available, concluded that petitioner now suffers and did suffer in 1965 from paranoid schizophrenia. At the time of his 1965 trial, Dr. Cannon further concluded that Mr. Bruce's condition was manifest in an exerbated state such as to render him incompetent under the *Dusky* standard. Dr. Grigson, upon his examination of petitioner and a similar review of the records and prior testimony concluded that petitioner does not and did

[2] The records of various physicians, psychiatrists and nonpsychiatrists, psychologists, those from the Texas Department of Corrections, petitioner's medical history in the military, other lay testimony and the records of petitioner's various judicial proceedings were utilized and mentioned by both Drs. Cannon and Grigson in their reports and testimony.

not in 1965 suffer from schizophrenia, but rather he evinced a sociopathic personality.[3]

I felt that these divergent medical views as to petitioner's current and past mental status necessitated a further two pronged inquiry. The first involves resolution of the two diagnoses. If Dr. Grigson's conclusions are accepted, i.e., that petitioner was and is a sociopathic personality, then that finding would support the conclusion that he had the requisite degree of rational understanding during his 1965 trial. The second inquiry is necessary if Dr. Gannon's evaluation of petitioner, i.e., that he suffers and did suffer from paranoid schizophrenia, is accepted. Then the question becomes whether or not petitioner was in an exacerbated state of this condition at the time of his trial so that he lacked the requisite degree of rational understanding. This second inquiry is necessary because of Dr. Cannon's testimony as to the nature of paranoid schizophrenia. Dr. Cannon testified that this condition afflicts individuals in fluctuating degrees over time. The mental disturbance can be in a state of remission wherein a person can be functionally "normal" and possess a rational degree of understanding of his surroundings or it can be exacerbated wherein an individual could be rendered legally incompetent to stand trial.[4]

[3] Dr. Cannon first saw petitioner briefly while in jail but was unable to examine him because he became emotionally distraught. Her subsequent examination was of approximately three hours duration. Dr. Grigson's examination spanned two hours. He had previously examined petitioner for a one hour period in connection with the state habeas hearing in 1969. Correspondence and other portions of the record in this matter show that petitioner's emotional outburst in refusing to see Dr. Cannon in July, 1974 was a rational and not an irrational act.

[4] The question is not whether or not petitioner now suffers from or ever did suffer from mental illness but rather did he possess a significant ability to consult with his trial attorney with a reasonable degree of rational understanding and whether he possessed a rational and factual understanding of the trial proceedings. *Dusky v. United States, supra.* As the Fifth Circuit observed, one can suffer from mental illness which is at the root of any antisocial conduct and yet possess the requisite rational understanding to stand trial. *Lee v. State*, 406 F.2nd paranoid schizophrenia is manifest in varying degrees. *See* footnote 11, infra.

I initially conclude that Dr. Grigson's testimony and evaluation best demonstrates petitioner's mental condition at the time of his 1965 trial. I feel his conclusions are supported by the entire record and find that Dr. Cannon's evaluation and review of petitioner's mental condition obliquely supports his viewpoint.[5]

Dr. Grigson examined petitioner for the purposes of the instant hearing on October 25, 1973. That examination lasted some two hours. Dr. Grigson also had occasion to examine petitioner for about one hour in connection with state proceedings in 1969. As previously noted Dr. Grigson as well as Dr. Cannon, considered other portions of the entire record before this Court and used this material as a basis for his medical conclusions.

I feel that three circumstances brought out in testimony have particular significance in connection with Dr. Grigson's diagnosis and evaluation. *First* is that portion of the record which reflects petitioner's *early difficulty with family and school.* Dr. Grigson described this behavior as "antisocial". He distinguishes early antisocial behavior as being characteristic of a sociopathic personality as opposed to the pre-schizophrenic.[6] Dr. Cannon noted petitioner's early conduct and indicated that such behavior was compatible with both schizophrenia and a sociopathic personality.[7] *Second:* the testimony of both Drs. Grigson and Cannon concerning petitioner's *behavior during his 1965 trial* is of significance. Much was said of outbursts made by petitioner during the trial. Dr. Cannon observes that petitioner was unable to assist his attorney during the trial ". . . at the times when Mr. Bruce made several emotional outbursts . . ."[8] She related these

[5] Dr. Cannon, in her report extensively reviews the same events which Dr. Grigson considered. Testimony reveals that much of this scrutinized behavior is consistent with either schizophrenia or a sociopath.

[6] *Transcript of Proceedings* (hereinafter Transcript), pp. 104-05.

[7] *Transcript*, p. 29.

[8] Dr. Cannon's Report, finding #12.

outbursts as they appeared from the record to the outburst made by petitioner when he refused to see her on her initial attempt to examine him. Even accepting this testimony to mean that petitioner was unable to effectively assist his lawyer in the conduct of the trial during these outbursts, I do not feel that this alone would render petitioner incompetent under the *Dusky* standard.[9] When viewed in context of the trial, the outbursts take on less significance. The record shows that they occurred in part when petitioner's daughter was testifying. Emotional outbreaks during emotion laden portions of a difficult trial are not conclusive of an inability to have rational understanding of the proceedings. In fact one could conclude that Mr. Bruce's anguish was in fact, indicative of a great degree of understanding of what was occurring. As Dr. Grigson pointed out, the outbursts were controlled by petitioner upon adequate admonitions from the trial court, indicating petitioner possessed rational as well as factual understandings of the proceedings.[10] I agree.[11]

Next, I note the question of petitioner's "faking his symptomology. Dr. Grigson testified that petitioner told him during his October 1973 examination that he, Bruce, had "put a story" over on him in the 1969 examination, i.e., that he had been faking.[12] In the state court competency hearing in 1969 Dr. Grigson testified that he felt petitioner was faking his symptoms. Mr. Bruce's admission during his examination for the instant hearing is, I believe, corroborative of Dr. Grigson's testimony in

[9] Dr. Cannon testified that this is true in a medical sense also. *Transcript, p. 67.*

[10] Dr. Grigson's report, finding #7.

[11] Dr. Cannon testified that the different mental states of a schizophrenic (or any individual for that matter), can change quite rapidly. She recounted an example of a schizophrenic whom she observed go from a state of exacerbation to remission within a 30 second span. *Transcript,* p. 60.

[12] *Transcript,* pp. 93, 110-11, 145-47. In the state court competency hearing in 1969 Dr. Grigson testified that he concluded that petitioner was faking his symptoms.

the state proceedings and in this hearing that he was indeed faking.[13]

I find Dr. Grigson's diagnosis to be the proper one for disposition of this matter. His testimony is more cogent when considered with the fact that it is consistent in some measure with Dr. Cannon's evaluation.[14]

The elements of periodic psychiatric incompetence, faking, early difficulties or any other factor are all important considerations useful in reaching an ultimate conclusion but do not taken alone in and of themselves resolve the issue. The record taken as a whole generally exhibits throughout and particularly in petitioner's own testimony, a man (1) aware of his presence in relation to time, place and things; (2) who apprehends the criminal accusation taking place in a formalized proceeding; (3) in which he is obviously aware he is expected to and does assist himself through legal counsel's knowledge of the facts provided to counsel from the accused's memory; and (4) knowing that finally his responsibility will be decided. In the light of these findings, I conclude that petitioner was a sociopathic personality and did not lack the requisite degree of rational understanding of the 1965 proceedings against him; nor did he lack the ability to consult with his lawyer with a reasonable degree of rational understanding. I find that petitioner did have such an

[13] I do not consider faking, alone to be dispositive of whether petitioner has a sociopathic personality or suffers from schizophrenia. *See Transcript,* pp. 54-57. When viewed in the context of all the evidence considered, however, I do find it to be supportive of Dr. Grigson's evaluation. *See,* Dr. Cannon's testimony, *Transcript,* p. 65.

[14] *Transcript,* pp. 29-30.

understanding at the time of his trial and that accordingly his petition should be denied.[15]

Entered this 24th day of July, 1975.

ELDON B. MAHON
United States District Judge

[15] I am unpersuaded that petitioner has met his burden of proof to show that any mental illness he may have been afflicted with in 1965 left him without that degree of rational understanding which must be shown before his conviction would be set aside. I find that the only inference that can be drawn from Dr. Cannon's diagnosis is that petitioner is afflicted with paranoid schizophrenia. Clear and convincing evidence is wanting as to petitioner's lack of rational understanding during the 1965 proceedings or lack of ability to consult with his lawyer at that time. The only probative evidence of petitioner's incompetency is equivocal at best. *See, Transcript,* p. 75 where Dr. Cannon observed that petitioner certainly did understand questions propounded to him and was responsive to those questions. Both Drs. Cannon and Grigson agree that a sociopathic personality is by nature manipulative. *Transcript,* pp. 31, 101, 144-5. I believe that the record affirmatively demonstrates, petitioner's manipulative abilities, from early childhood to the present and such fact is best understood by Dr. Grigson's evaluation and diagnosis.

In The

Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-684

W. J. ESTELLE,

Petitioner,

v.

ROBERT VERNON BRUCE,

Respondent.

ADDENDUM OF THE FIFTH CIRCUIT COURT OF APPEALS OPINION

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Robert Vernon BRUCE,
Petitioner-Appellant,
v.
W. J. ESTELLE, Director, Texas
Department of Corrections,
Respondent-Appellee.
No. 75-3284.
UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
Aug. 9, 1976.

Appeal from the United States District Court for the Northern District of Texas.

Before DYER and CLARK, Circuit Judges, and KRAFT,* District Judge.

CLARK, Circuit Judge:

This appeal caps a series of protracted postconviction proceedings designed to determine whether Robert Bruce was legally competent to stand trial for the murder of his wife in 1965. Pursuant to our mandate in Bruce's last appeal, the district court conducted a *nunc pro tunc* competency hearing and concluded that petitioner did not suffer from any mental illness which would interfere with his ability to assist in his own defense and factually and rationally understand the proceedings against him. Since we are unable to agree with that crucial determination, we must reverse and order that the writ of habeas corpus be issued subject to the right of the State of Texas to retry petitioner within a reasonable time.

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* Senior District Judge of the Eastern District of Pennsylvania, sitting by designation.

As we recognized in our prior opinion, the factual background pertinent to petitioner's constitutional challenge is far from routine. Retelling the story properly begins this analysis. On the morning of December 22, 1964, Bruce shot and killed his wife of 12 years, the mother of his three children. When the police arrived in response to Bruce's telephone call, they found him partially crying and asking over and over again if his wife was dead. While confined in the Dallas County jail subsequent to arrest, Bruce attempted to commit suicide. Bruce's father initially retained attorney Joe McNicholas to represent his son. At first McNicholas was unable to interview his client because he appeared to be in a state of shock. Upon learning that Bruce had experienced psychological difficulties while serving in the Marine Corps in the 1950's, McNicholas obtained his client's military treatment file. The records recounted two disturbing episodes which precipitated Bruce's medical discharge from the service. Each time Bruce had become extremely belligerent after drinking heavily. On one occasion he commandeered a barracks for 20 minutes before he was finally subdued and taken to the hospital by six Marines. Based on this medical history, Bruce's counsel arranged for his client to be examined by the county health officer and Dr. Holbrook, a psychiatrist. They concluded that Bruce was suffering from a severe chronic paranoid personality disorder and that he might be dangerous to himself or to others if not confined. Dr. Holbrook predicted long-term psychiatric hospitalization.

Thereafter, the Dallas County Grand Jury which had been investigating the shooting decided to no-bill the case and order Bruce held for a lunacy commitment. On March 3, 1965, the Probate Court adjudged Bruce "mentally ill" and directed that he be involuntarily committed to Terrell State Hospital for his own

welfare and the protection of others. From the record it appears that this adjudication has never been set aside.

While at Terrell, Bruce was prescribed large daily dosages of an anti-psychotic medication by the staff physician. At that time he related to his father that he had seen his dead wife coming down the walk and accused his parents of hiding her from him, claiming that she was probably now working on the second shift at a local factory. After being confined for a little over a month. Bruce's discharge was authorized by an imposter who was neither a psychiatrist nor a physician. The "doctor" was eventually convicted and imprisoned for perjury and practicing medicine without a license. Approximately a month later, Bruce voluntarily recommitted himself to Terrell but soon thereafter escaped. He spent the next few weeks at his parents' home, a motel and in an alcohol treatment center.

Bruce's legal difficulties commenced when the district attorney's office learned that Bruce was no longer at Terrell. His case was represented to the grand jury; this time Bruce was indicted for murder with malice aforethought. Attorney McNicholas advised that an insanity defense be urged. However, both Bruce and his father insisted that insanity not be raised, apparently because they believed such a plea would "reflect on his children." McNicholas was dismissed and another attorney, Mr. Snodgrass, was retained under instructions not to make an issue of petitioner's mental state.

The only defense offered at the murder trial was that the shooting was an accident. Bruce testified to his version of the event in a logical and understandable fashion and was able to withstand thorough-going cross-examination. When his daughter was on the stand, however, Bruce interrupted the proceedings twice with statements disputing her testimony and

urging her to tell the truth. At one point the judge threatened to bind and gag petitioner if he continued to disrupt the trial with his outbursts. Neither the state nor the defense explored the subject of Bruce's mental condition. The jury did not learn of the prior commitment; in fact, Bruce denied on cross examination that he had ever been treated for a nervous condition. Rejecting the accident defense, the jury returned a guilty verdict and Bruce was sentenced to life imprisonment. His conviction was affirmed on direct appeal. *Bruce v. State,* 402 S.W.2d 919 (Tex.Cr.App.1966).

Upon conviction, Bruce was assigned to the Wynne Treatment Unit of the Texas Department of Corrections. Two staff psychiatrists diagnosed his condition as "schizophrenic, chronic, undifferentiated" and again Bruce was treated with anti-psychotic medication.

The anfractuous ten-year postconviction route began with an application for a writ of habeas corpus to the Texas Court of Criminal Appeals. One of the grounds urged by Bruce was "insanity" at the time of trial. The state court denied the writ without a hearing. Similarly, the federal district court refused all relief. On appeal this court vacated and remanded to allow Bruce to reapply to the state convicting court under recently enacted postconviction provisions. *Bruce v. Beto,* 396 F.2d 212 (5th Cir. 1968).

To resolve the several competency and sanity questions related to Bruce's conviction, the state convicting court empaneled an advisory jury and conducted an extensive evidentiary hearing in 1969. Four witnesses provided testimony supporting Bruce's claim of incompetence. Bruce's father recounted how his son had never performed well in school and had constantly complained that his teachers and classmates were mistreating him. Bruce's

employment record was equally poor and unstable. He could not hold a steady job and a pattern emerged whereby he would either get mad and quit or be fired. Two physicians who had performed mental status examinations on Bruce prior to the hearing and had access to petitioner's medical history testified that they believed that Bruce was incompetent at his 1965 trial. Both experts concluded that Bruce suffered from a severe form of schizophrenia. Dr. Tauber had seen Bruce daily over a six-week period; his diagnosis of paranoid schizophrenia was confirmed by a battery of tests administered to Bruce by a consulting psychologist. Finally, attorney McNicholas related that while he was employed as counsel, Bruce had not provided any assistance in his defense; he expressed the opinion that his former client was a very sick man.

The state's case revolved around the testimony of two witnesses. Bruce's trial attorney stated that he believed that petitioner was able to reasonably confer with and assist him at trial, except for two occasions (coinciding with the outbursts) when Bruce became so deeply, emotionally involved that he was incapable of communication. The evidence most damaging to petitioner's incompetency claim was provided by Dr. Grigson, the state's sole expert witness. Dr. Grigson explained that he had detected intentional falsification in some of Bruce's responses when he conducted an hour-long mental status examination of petitioner prior to the hearing. On the basis of this faking determination and a study of petitioner's medical history, Dr. Grigson concluded that the other doctors' diagnoses of schizophrenia were wrong, and that Bruce was merely a malingerer who was certainly able to function well enough to assist his attorney in his defense.

The jury returned a verdict deciding all competency and sanity questions adversely to Bruce and the trial court entered judgment in accordance with the verdict. When Bruce returned to federal court with his second habeas petition, the district judge dismissed the action on the basis of the state court findings. However, on appeal this court again reversed, characterizing the state proceedings as fundamentally unfair. The major deficiencies cited were the failure to separate the various competency and sanity questions, prejudicial closing remarks and application of an improper standard to determine competency to stand trial. *Bruce v. Estelle,* 483 F.2d 1031 (5th Cir. 1973). This time we remanded to the federal district court to resolve the single question of petitioner's competency in 1965. The district court was instructed to initially determine whether a meaningful *nunc pro tunc* hearing could be conducted at this late date and, if so, to reach and decide the competency issue.

Two psychiatrists were appointed by the district court to examine Bruce, furnish a medical report and testify at the 1974 retrospective hearing. The experts' reports revealed irreconcilable differences with respect to the crucial threshold question of whether Bruce had ever suffered from any clinically recognized psychiatric disorder. Dr. Grigson, the same physician who testified at the 1969 hearing, was one of those appointed. He persisted in believing that Bruce had never been psychotic and was at all times legally competent. This time he diagnosed petitioner as a sociopath, a descriptive term used for otherwise mentally well persons who frequently commit antisocial aggressive acts. In marked contrast, the other appointed psychiatrist, Dr. Cannon, looking at the same history and the same subject, concurred with the physicians who had previously diagnosed Bruce as schizophrenic and went on to list 16 reasons

to support her conclusion that at the time of trial Bruce's disease caused him to be incompetent.[1]

At the evidentiary hearing both experts elaborated on their divergent opinions. About the only point of agreement was that a meaningful retrospective hearing was possible provided that pertinent legal and medical records were combined with current medical evaluation to produce a hindsight picture of Bruce's mental condition in 1965. Dr. Cannon's reasons for finding Bruce incompetent were explored in detail. She explained that none of the cited incidents alone would invariably point to paranoid schizophrenia and thence to incompetency. Rather her medical diagnosis and resultant conclusion on competency were based on the total picture. According to Dr. Cannon, several of the mentioned factors (*e. g.*, childhood emotional problems, poor job record, law violations, attempted suicide) could also be present in the profile of a sociopathic personality. Similarly, it would not be impossible for a sociopath to have engineered the disturbances leading to Bruce's military discharge, though this kind of behavior is more easily explainable as a dissociative reaction characteristic of a primary symptom of schizophrenia. But in concluding that Dr. Grigson was wrong in his diagnosis, Dr. Cannon emphasized that Bruce had been medically treated as a schizophrenic since he entered Terrell shortly after his arrest and pointed out that there is no medically justifiable reason to prescribe antipsychotic drugs for a sociopathic condition. Since Dr. Cannon had also found evidence of schizophrenia during her

[1] Dr. Cannon's list consisted of: 1) history of emotional disturbances; 2) poor job record; 3) law violations; 4) disruptive episodes in armed forces; 5) overindulgence in alcohol; 6) anger at time of offense; 7) attempted suicide; 8) diagnosis of Dr. Holbrook; 9) Terrell commitment; 10) release by imposter; 11) discharge of Mr. McNicholas; 12) opinion of Mr. Snodgrass concerning temporary incapacity; 13) trial outbursts; 14) anti-psychotic drug treatment at Wynne Center; 15) testimony of Dr. Tauber and Dr. Brown at 1969 hearing; 16) incorrect evaluation of Dr. Grigson.

examination of Bruce and the history of Bruce's legal and personal problems tended to corroborate (or at least was not inconsistent with) that diagnosis, Dr. Cannon concluded that Dr. Grigson's medical opinion could be discounted as unsupported. Her analysis then progressed to the more difficult determination of whether Bruce's mental disorder resulted in incompetency. In medical terms, this inquiry translated into whether petitioner's illness was in remission or in an overt state at the time of trial. Dr. Cannon concluded from the medical history that Bruce had progressively deteriorated until he became overtly and openly psychotic following his wife's death and that his condition did not stabilize until after he received heavy medication and lived in a structured, rigid environment over the next few years. On cross-examination, however, Dr. Cannon conceded that mental states (*e. g.*, exacerbation or remission) can on occasion change quite rapidly and that it was possible that Bruce was not incompetent every moment of his trial.

The starting point of Dr. Grigson's evaluation was that he found no evidence of the primary symptoms of schizophrenia (principally thought disorganization) when he examined Bruce in 1969 and again in 1974. He then testified that Bruce's behavior pattern was not only characteristic of a sociopathic personality, but was entirely inconsistent with a diagnosis of paranoid schizophrenia. In contrast to Dr. Cannon's statement that many of the aberrant incidents in Bruce's life could suggest either diagnosis, Dr. Grigson insisted that there was absolutely no clinical similarity between the two conditions. As a sociopath, Bruce was devoid of conscience and most of his behavior could be interpreted as merely an attempt to manipulate others. For example, Bruce admitted to faking his 1969 interview with Dr. Grigson, presumably in the hopes that the psychiatrist would

pronounce him incompetent. Likewise, the trial outbursts were viewed by the witness as purposefully designed to destroy harmful testimony. To Dr. Grigson, even Bruce's professed visual hallucinations were nothing more than stories designed to "manipulate" his parents. Most importantly, Dr. Grigson dismissed the other expert opinion as incorrect, claiming that he was the only one truly qualified and experienced enough to arrive at the correct evaluation.

A detailed opinion was written by the district court which has proven most helpful in our review. While recognizing that its ultimate task was to rule on the legal issue of competency, the court reasoned that it should initially resolve the conflict between the experts, for if Bruce could properly be classified as a sociopath, there would be no medical reason for believing that his "illness" could in any way interfere with his ability to understand the proceedings and assist counsel. The court in its opinion did not undertake an independent review of the background facts as they related to petitioner's competency claim; instead, it principally dealt with the testimony of the two psychiatrists at the 1974 hearing who had utilized petitioner's medical and legal records in constructing their professional opinions.

Dr. Grigson's analysis was found the more convincing. Three circumstances were cited as particularly supportive of Dr. Grigson's approach: Bruce's early antisocial behavioral pattern, the trial transcript and Bruce's propensity to fake his symptoms. The court was persuaded by Dr. Grigson's statement that early antisocial behavior is characteristic of a sociopathic rather than a pre-schizophrenic type and its view was bolstered somewhat by Dr. Cannon's concession that such behavior is compatible with either diagnosis. For the court, the outbursts took on less

significance when viewed in the context of an "emotion laden" portion of a difficult trial, especially since they might also be indicative of purposefulness and rationality. Finally, though admitting that true schizophrenics may also be fakers, the court considered Bruce's pretense to be consistent with a manipulative personality and corroborative of Dr. Grigson's overall evaluation. After finding that petitioner had never suffered from any potentially incapacitating ailment, the court had little difficulty in pronouncing him retrospectively competent. In the alternative, the court mentioned in a footnote that even if Dr. Cannon's diagnosis were correct, it had found no clear and convincing evidence that Bruce's mental disorder was manifest in such a degree as to cause him to fall below the *Dusky* standard.[2]

I. Meaningfulness of *Nunc Pro Tunc* Competency Hearing

In our prior opinion we commented upon the possibility of holding a meaningful retrospective hearing despite the long interval since the trial.[3] While leaving this determination as a threshold question for the district court, we expressed the view

[2] *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960) articulated the test for mental competency to stand trial as "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."

[3] This court has never held that Bruce's trial violated *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) which requires that adequate state procedures be employed when a bona fide doubt as to competency *appears* at trial. Because of the decision not to raise the sanity issue, the trial court presumably was not aware of Bruce's medical difficulties. On this appeal, Bruce argues that a *Pate* violation occurred when the district attorney became aware of Bruce's condition. *Cf. Fitzgerald v. Estelle*, 505 F.2d 1334 (5th Cir. 1974) (en banc). The question of a *Pate* violation *vel non* can be important because of language in *Nathaniel v. Estelle*, 493 F.2d 794, 798 n. 6 (5th Cir. 1974) which indicates that the meaningfulness determination is inappropriate when there is no *Pate* violation. We are bound, however, by the law of this case which directed the district court to initially determine the possibility of holding a meaningful hearing.

that "the evidence tends to support the conclusion that a meaningful hearing can now be conducted." 483 F.2d at 1043. The central factor cited was the abundance of expert testimony, particularly contemporaneous observations by the staff at Terrell. On remand, the district court addressed the meaningfulness question to both testifying experts. The doctors agreed that a reliable after-the-fact determination could be made if the records pertaining to Bruce's legal and medical history were taken into account. Since there was ample evidence that both experts had extensively utilized the record in developing their opinions, the court held that it was possible to hold an adequate hearing.

On appeal Bruce makes three arguments for overturning the district court's meaningfulness ruling, none of which persuades us to do so. First, Bruce contends that the more than nine-year gap between the trial and the competency hearing precludes any intelligent retrospective resolution of the issue. Such a per se argument is not appropriate here. Recently in *United States v. Makris*, 535 F.2d 899, 904 (5th Cir. 1976), we remarked that "the passage of even a considerable amount of time may not be an insurmountable obstacle if there is sufficient evidence in the record derived from knowledge contemporaneous to trial." A reliable reconstruction of petitioner's mental status in 1965 depends less on time than on the state of the record. Especially where medical information substantially contemporaneous to trial is available, the chances for an accurate assessment increase. *Holloway v. United States*, 119 U.S.App.D.C. 396, 343 F.2d 265 (1964). As the voluminous record in this case suggests, time alone did not vitiate the opportunity for a meaningful hearing.

The remaining challenges concern the district court's treatment of expert opinion and were also adequately discussed and

dismissed in *Makris*. Specifically, Bruce urges that it is inconsistent to allow the existence of contemporaneous medical evidence to contribute to an affirmative ruling on meaningfulness whenever the conclusions of those experts on the competency issue are ultimately rejected. Although not specifically mentioned by the district court, the existence of the medical record developed in connection with Bruce's pretrial confinement at Terrell undoubtedly aided the court in deciding that it was possible to hold a retrospective hearing.[4] Nor can it be disputed that in finding Bruce competent (and non-psychotic), the court took a position at variance with the diagnosis and treatment prescribed by those physicians who had the opportunity to observe and examine petitioner close to the trial date.

As *Makris* demonstrates, however, this apparent inconsistency does not necessarily vitiate the court's ruling on meaningfulness. The meaningfulness determination is a threshold legal inquiry which is not measured against the same scale as the later ruling on the merits. It is the existence of contemporaneous data (both medical and lay), not the experts' interpretation of that data, which is the critical element at this stage of the inquiry. In *Makris,* the contemporaneous lay evidence pointed to competency, while the contemporaneous medical evidence suggested incompetency. The district court was faced with a dilemma, for unless it "rejected" the view of either the laymen or the experts, no determination could be made at all. In affirming the lower court's ruling that a meaningful retrospective hearing was possible, we emphasized that the court was not bound by the experts' inferences, but must decide for itself if the quantity and quality of

[4] The court placed much weight on the experts' opinions. They in turn had access to and utilized Bruce's prior medical record.

available evidence was adequate to arrive at an assessment that could be labeled as more than mere speculation. Although the contemporaneous lay evidence favoring competency in today's case (the trial transcript and the opinion of attorney Snodgrass) is not nearly as strong as that present in *Makris,* the district court was nevertheless justified in holding the retrospective hearing here. The court had been assured by the experts that the contemporaneous medical evidence had been used by them in arriving at their present diagnoses and retrospective opinions on competency. Both the transcript of the trial and the record of the state postconviction hearing were available. The abundance of record evidence indicates that the *nunc pro tunc* substitute hearing was as reliable as if it had been held prior to trial. This is not to say that the judicial task of evaluating the contemporaneous data to determine competency was therefore an easy one. On the contrary, we believe that despite a careful review, the district court erred in pronouncing Bruce competent. Affirmance of the district court's meaningfulness ruling declares only that the record was complete enough to make an intelligent determination, not that the ruling made was correct. Similarly, Bruce contends that the conflict among the experts in their ultimate opinions as to competency is alone enough to destroy the chance of conducting a meaningful hearing. See *Clark v. Beto,* 359 F.2d 554 (5th Cir. 1966). We disagree. The district court had enough probative evidence before it to resolve the conflict. That it did so incorrectly is irrelevant to the primary meaningful hearing inquiry.

II. Burden of Proof/Scope of Review

Before reaching the merits of the case, we must briefly address preliminary questions concerning the proper allocation of the burden of proof and the scope of appellate review in this federal

habeas proceeding. Although referring only to direct criminal appeals, much of the discussion devoted to these two threshold issues in *Makris* is also relevant here. In that case, we rejected the contention that the Supreme Court's recent decision in *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) required the prosecution to prove an accused's competency beyond a reasonable doubt and instead allowed the government to discharge its burden by the less stringent preponderance standard. On the related question of this court's scope of review, we read the Court's latest competency ruling in *Drope v. Missouri,* 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) to require that while we must take a hard look at the district court's ultimate determination, the clearly erroneous rule could still be applied in connection with the lower court's evidentiary or primary factfindings.

The standard enunciated in *Makris* for appellate review is equally applicable to appeals from the district court in habeas proceedings. As long as a federal court has initially engaged in independent factfinding, this court need not review *de novo.* The combination hard look/clearly erroneous formulation is as suitable to protect the rights of state prisoners as those charged with federal offenses. A different appellate standard for state habeas cases could compound the confusion in this already difficult area.

In contrast, the burden of proof question cannot be answered solely by reference to *Makris* because of the substantial difference between direct and collateral attacks. As Bruce readily acknowledges, the burden of proving a constitutional violation ordinarily lies with the petitioner in a habeas proceeding. *Hawk v. Olson,* 326 U.S. 271, 279, 66 S.Ct. 116, 120 90 L.Ed. 61 (1945);

Johnson v. Zerbst, 304 U.S. 458, 468, 58 S.Ct. 1019, 1025, 82 L.Ed. 1461 (1938); *Conner v. Wingo,* 429 F.2d 630, 637 (6th Cir. 1970), *cert. denied,* 406 U.S. 921, 92 S.Ct. 1779, 32 L.Ed.2d 121 (1972). Unless he proves the facts necessary to establish his claim to relief by a preponderance of the evidence, the collateral attack will fail. Where the asserted ground for relief is incompetency at trial, the habeas court will require a certain quantum of evidence before it even entertains the claim. As we stated in Bruce's second appeal:

> We consider it appropriate to add a caveat with respect to cases of this type. Courts in habeas corpus proceedings should not consider claims of mental incompetence to stand trial where the facts are not sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during a criminal trial. While the factual pattern will vary from case to case, the instant case illustrates the standard which should be met to sustain such a claim, *viz.* a history of mental illness, substantial evidence of mental incompetence at or near the time of trial supported by the opinions of qualified physicians and the testimony of laymen. The burden is on the petitioner to prove his allegations; such proof should be clear and convincing.

483 F.2d at 1043.

Bruce argues that the above quotation should be interpreted as holding that he has already discharged his clear and convincing burden and that the burden now shifts to the state to prove his competency. On remand, the same language was relied upon by the district court as authority for ruling that the petitioner had still to prove his incompetency claim by clear and convincing evidence. We disagree with both these constructions, because we

read the prior panel's caveat as referring only to the petitioner's threshold burden of proof which must be satisfied before the habeas court has a duty to investigate the constitutional challenge further. Once petitioner has come forward with enough probative evidence to raise a substantial doubt as to competency, however, his task is not complete. He must then go further and prove the fact of incompetency, at least by a preponderance of the evidence.

Although particularly tailored to competency claims, this allocation is essentially the traditional one. As the habeas cases indicate, it is entirely proper to place the burden on the petitioner. *See Drope v. Missouri,* 420 U.S. 162, 174, 95 S.Ct. 896, 905, 43 L.Ed.2d 103 (1975). Similarly, proof by a preponderance (especially after establishing clear doubt) is all that is required. *See Lego v. Twomey,* 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2nd 618 (1972); *United States v. Makris,* 535 F.2d 899, 906 (1976). To place a greater burden on the petitioner might bring up due process considerations.[5] In sum, at the federal *nunc pro tunc* hearing, Bruce had the burden of proving that he was most probably incompetent at the time of his 1965 trial.

III. Competency

The ultimate focus in a retrospective competency hearing must be whether at the time of trial the accused had sufficient ability to consult with his attorney with a reasonable degree of rational understanding and whether he had a rational as well as factual understanding of the proceedings against him. *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). Before the court can meaningfully apply this legal standard, however, it must often ascertain the nature of petitioner's allegedly

[5] We are not bound by the dicta in *Nathaniel v. Estelle,* 493 F.2d 794, 798 (5th Cir. 1974) which reads the *Bruce* caveat as adopting a clear and convincing standard even after real doubt has been established.

incapacitating illness. It is at this initial juncture that expert testimony is particularly valuable, for the existence of even a severe psychiatric defect is not always apparent to laymen. Because of this difficulty in detecting medical diseases, the trial court may find it necessary to make an initial factfinding on whether the accused suffers from a mental defect at all. Although sometimes dispositive of the ultimate competency question, this medical inquiry is properly classified as pure factfinding and reviewable only under the clearly erroneous standard.

Once it is established that an individual suffers from a clinically recognized disorder, the court must decide whether such condition rendered the accused incompetent under the *Dusky* formulation. As enunciated in *Makris,* this second stage determination of legal incompetency is subject to a review more stringent than the clearly erroneous rule. To insure protection of valuable constitutional rights, this court is bound to take a hard look at the ultimate competency "finding."

The district court correctly determined that its first task was to decide whether Bruce suffered from a form of schizophrenia or was simply a sociopathic personality. This primary factfinding was crucial, for unless the underlying schizophrenic disorder were present, there could be little doubt of competency. As we understand the experts' description, a sociopath suffers from no disability which could affect competency. The medical term solely describes manipulative, egocentric persons who frequently commit antisocial acts without feelings of remorse. The expert testimony established that if Bruce should be classified as a sociopath, he would have no medical basis for claiming a diminished capacity to understand his trial or assist his attorney. A finding that Bruce's actions established he was a sociopath

would thus be equivalent to finding no medical defect at all.

While we agree with the court's method of first resolving the conflicting diagnoses, we must declare its finding that Bruce is a sociopath clearly erroneous. The factfinder is not lightly to be disregarded, and the disagreement here is not easily reached. Neither the court's three reasons for crediting Dr. Grigson's evaluation nor anything else in this extensive record dispels our definite and firm convicion that the court made a mistake in failing to find that the petitioner's mental condition at the time of trial was at the very least potentially disabling. Indeed, the bizarre and tragic facts of this particular case compel the conclusion of clear error.

Of the three reasons given by the court for accepting Dr. Grigson's diagnosis, the first two do not support the court's findings;the third, while more probative, pales in significance when viewed in the proper context of the entire record.

(1) *Bruce's early antisocial behavior.*

Contrary to Dr. Grigson's position, the preponderant medical view is that Bruce's early antisocial behavior is compatible with either of the two competing diagnoses. The other physicians who examined Bruce and detected schizophrenia were aware of this history, yet this knowledge served to bolster rather than to change their professional opinions. Even the district court concluded that much of Bruce's "scrutinized behavior is consistent with either schizophrenia or a sociopath." In view of the lack of a definite correlation between an antisocial behavioral pattern and a given medical classification, this factor cannot be listed as supportative of either physician's view.

(2) *Bruce's propensity to fake his symptoms.*

The court recognized that Bruce's admitted faking would not "be dispositive of whether petitioner has a sociopathic personality or suffers from schizophrenia." Convinced that Bruce's faking could not change her diagnosis, Dr. Cannon testified that "anyone can attempt to fake. But at the time the schizophrenic would be attempting to fake mental illness, his real symptoms of schizophrenia would be present." Fakery by Bruce permits two equally permissible inferences. It could be that as a sociopath he faked his 1969 interview in an attempt to fool Dr. Grigson into believing him schizophrenic. Or the attempt at deception could be viewed as a manifestation of Bruce's paranoid personality, *i. e.*, Bruce dissembled because he did not trust the doctors with the truth. The only certainty is that like the antisocial behavior factor, the ambivalence of the faking factor eliminates its utility in the balancing process.

(3) *Reliance on trial transcript.*

Viewed in isolation, the court's reliance on the significance of the 1965 trial transcript seems to be a more weighty matter. Putting to one side Bruce's abnormal medical history, his testimony has the appearance of being the product of a rational mind and the much-discussed outbursts may be explained away as "normal" emotional releases in the context of this intrafamily tragedy. Judged in this light, Dr. Grigson's insistence on Bruce's capacity to think rationally appears corroborated.

However, as soon as the trial transcript is perceived in the context of petitioner's entire medical and personal background, as it must be, it cannot serve as the basis for concluding that Bruce suffered from no recognizable medical defect. The weight of the

entirety of the remaining probative evidence simply overwhelms the opposite conclusions that might be drawn if only the transcript were considered.

A summary of the extensive medical and lay evidence adduced over a nine-year span convincingly demonstrates that Bruce was schizophrenic in 1965 and serves to discredit Dr. Grigson's analysis. Except for Dr. Grigson, all the physicians who examined Bruce detected an underlying schizophrenic disorder. Most significantly, the experts who observed Bruce prior to the trial treated him as a dangerous psychotic who needed large dosages of medication to keep under control. After Bruce was convicted, the diagnosis of the doctors at the Wynne Unit was again "schizophrenic" and drug treatment was accordingly prescribed. The two physicians who conducted extensive testing in 1969 in preparation for the state postconviction hearing arrived at the same result. Finally, almost ten years after trial, Dr. Cannon examined Bruce and classified him as a paranoid schizophrenic.

In contrast, the only dissenting expert, Dr. Grigson, conducted his first examination three and one-half years after trial. When compared to the conclusions of those conducting more contemporaneous examinations, this lapse alone diminishes the force of Dr. Grigson's contrary views. *United States v. Makris,* 483 F.2d 1082, 1090 (5th Cir. 1973). In today's case, the danger of putting too much weight on any expert's after-the-fact medical assessments is acute, for by 1969 Bruce had already undergone extensive treatment, including taking antipsychotic medication and being confined in a structured, supervised environment. Nor did Dr. Grigson keep Bruce under lengthy observation. In contrast to six weeks of study by Dr. Tauber, one of the treating psychiatrists in 1969, Dr. Grigson's exposure to the petitioner

both in 1969 and 1974 totaled less than four hours. When asked how it was possible that the other experts who had examined Bruce over a nine-year period had arrived at a radically different diagnosis, Dr. Grigson's sole explanation was that he was better qualified than they to determine Bruce's condition, a fact not established in the record.

Moreover, the accountants of petitioner's conduct related by lay observers during the relevant time-frame do not serve to erode the majority medical diagnosis. The strange facts of this case establish that Bruce often acted like a man who suffered from a severe psychotic disorder. The doctors' opinions aside, we are convinced that Bruce's continuing aberrant behavior cannot be uniformly dismissed as attempts to manipulate. To mention only the most striking events—the military episodes, the killing of his wife, the visual hallucinations and the escape from Terrell clearly appear to be products of a diseased mind. Had it not been for his release by a bogus doctor, Bruce might never have stood trial and the grand jury's initial decision to defer to the medical authorities might well have proven to be the wisest course.

Bruce's two attorneys possessed irreconcilable opinions concerning their client's mental state, though both counselors described conduct occurring at essentially the same time. Based on unsuccessful attempts to communicate and the observation that his client was in a state of shock following the killing, attorney McNicholas forcefully concluded that Bruce was a very sick man, possibly a schizophrenic. He was dismissed when he urged that an insanity defense be presented. McNicholas was succeeded by attorney Snodgrass, the only non-expert witness who even slightly indicated that Bruce was competent and rational. We are bound to note that had Snodgrass testified that Bruce's behavior was in fact inconsistent with his deference to

family instructions not to raise the issue of insanity, he would have placed himself in an awkward ethical position. *See Bruce v. Beto,* 396 F.2d 212, 213-14 (5th Cir. 1968) (Godbold, J., concurring). In sum, the overwhelming weight of the medical evidence pointed to schizophrenia and the clear preponderance of the lay testimony did nothing to discount that evaluation.

As the district court carefully noted, to label Bruce a paranoid schizophrenic does not end the inquiry. There still remains the ultimate question of whether Bruce's illness pushed him below the minimum level contemplated by *Dusky*. As expressed in *Makris,* our review of this portion of the district court's analysis is less restrictive; a critical reappraisal is required to guard petitioner's due process rights. At this stage, expert testimony is not so important, although the psychiatrist's "inexpert" opinion can be a factor in the court's independent decision.

This appellate review is disadvantaged because the district court essentially halted its analysis when it erroneously classified Bruce as a sociopath. Its alternative holding in the final footnote of its opinion—that even if Bruce suffered from schizophrenia in 1965, he was competent at his trial—is not fully helpful because it does not disclose the rationale for the court's conclusion.[6] Like its

[6] That portion of the opinion states: "I am unpersuaded that petitioner has met his burden of proof to show that any mental illness he may have been afflicted with in 1965 left him without that degree of rational understanding which must be shown before his conviction would be set aside. I find that the only inference that can be drawn from Dr. Cannon's diagnosis is that petitioner is afflicted with paranoid schizophrenia. Clear and convincing evidence is wanting as to petitioner's lack of ability to consult with his lawyer at that time. The only probative evidence of petitioner's incompetency is equivocal at best. *See Transcript,* p. 75 where Dr. Cannon observed that petitioner certainly did understand questions propounded to him and was responsive to those questions. Both Drs. Cannon and Grigson agree that a sociopathic personality is by nature manipulative. *Transcript,* pp. 31, 101, 144-5. I believe that the record affirmatively demonstrates petitioner's manipulative abilities, from early childhood to the present and such fact is best understood by Dr. Grigson's evaluation and diagnosis."

initial factfinding, the court's ultimate competency determination cannot withstand testing in light of the record. Once Bruce's schizophrenia is acknowledged, the conclusion that the disease prevented him from rationally communicating with his attorney and understanding the proceedings is most compelling.

There is much record evidence that Bruce was overtly schizophrenic at the time of trial. According to the testimony of his first attorney, the trauma of the shooting left Bruce in an uncommunicative state of shock. Not long before trial, Bruce had been medically determined to be dangerous to himself or others and had been institutionalized and treated for a severe psychotic condition. Bruce also claims to have experienced visual hallucinations while at Terrell, a recognized symptom of schizophrenia in an overt state. Even Bruce's trial attorney who did not consider his client incompetent admitted that for at least short intervals, petitioner was incapable of understanding or communicating.

The case for competence really boils down to the trial transcript and the judgment expressed by attorney Snodgrass that overall Bruce was competent enough to understand and assist. Both factors are relevant, but the value of each must be discounted. First, without the aid of the observations of the presiding trial judge, a printed record should be received with caution. A transcript cannot reveal tone, speech inflections, mood and other indicia of a mental state and certainly cannot pick up subtle but crucial changes in petitioner's demeanor. Second, as before mentioned, the testimony of attorney Snodgrass cannot be treated as that of a disinterested witness.

In reaching the conclusion that the evidence did preponderate in favor of finding Bruce incompetent, we are not disregarding the

uncontradicted medical testimony that mental states can change rapidly nor the indications that Bruce may have been competent for a portion of his trial. Neither are we holding that temporary medical problems are enough to cause failure of the *Dusky* test. *Cf. United States v. Makris,* 535 F.2d 899, 909 (5th Cir. 1976). Rather, what emerges from this record is a profile of a defendant with a severe psychiatric disorder which most probably caused him to misperceive important elements of the proceedings against him and likely interfered with his ability to relate the true facts to his counsel. Under the circumstances, Bruce proved as much as he could about his medical condition and certainly enough to carry his burden. Unless a psychiatrist had been at petitioner's side during the actual proceedings, there would be no truly reliable method of charting the possible changes in Bruce's mental state and establishing their effect on Bruce's legal competency. The only conclusion we can reach from this record is that Bruce's schizophrenic condition prevented him from effectively consulting with counsel and rationally understanding the proceedings.

The district court's order is therefore reversed with directions to issue the writ of habeas corpus subject to the right of the State of Texas to retry petitioner within a reasonable time.

REVERSED WITH DIRECTIONS.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-684

W. J. ESTELLE,

Petitioner,

versus

ROBERT VERNON BRUCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Robert Vernon Bruce, an inmate of the Texas Department of Corrections, respectfully moves pursuant to Rule 53 of the Court for leave to proceed in forma pauperis and to file the accompanying typewritten Brief in Opposition. The affidavit required by 28 U.S.C. § 1915 is attached to this motion.

Respectfully submitted,

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Counsel for Respondent Robert
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THE STATE OF TEXAS

COUNTY OF WALKER

AFFIDAVIT IN SUPPORT OF THE MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, ROBERT VERNON BRUCE, being first duly sworn according to law, depose and state in support of the foregoing motion for leave to proceed in forma pauperis that I am the Respondent in the above styled and numbered cause; that I am presently an inmate of the Texas Department of Corrections and am therefore unable to pay the fees or costs of this proceeding, to give security therefor or to afford the expense of printing Respondent's Brief in Opposition; and that I believe I am entitled to redress.

I have previously been allowed to proceed in forma pauperis in both the District Court and the Court of Appeals.

I am executing this affidavit pursuant to 28 U.S.C. § 1915. The matters stated herein are true and correct.

Robert Vernon Bruce
ROBERT VERNON BRUCE

BEFORE ME, the undersigned authority, on this day personally appeared ROBERT VERNON BRUCE, who being by me first duly sworn deposed and stated under oath that he is the individual named in the foregoing affidavit and that the matters stated therein are true and correct.

SUBSCRIBED TO AND SWORN BEFORE ME, a notary public, on this 30 day of Nov, 1976, to certify which witness my hand and seal of office.

T L Stokely
NOTARY PUBLIC IN AND FOR
WALKER COUNTY, TEXAS

T.L. STOKELY NOTARY PUBLIC
IN AND FOR WALKER COUNTY, TEXAS

IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

This case is extraordinary only in the sense that a mentally incompetent criminal defendant, convicted in a Texas court for the murder of his wife in 1965, has finally secured Federal habeas corpus relief in his third appearance before the United States Court of Appeals for the Fifth Circuit, after having presented the bizarre and totally unprecedented circumstances surrounding his conviction to approximately 22 State and Federal trial and appellate Judges in post-conviction proceedings that have lasted more than a decade.

Otherwise the judgment of the Court of Appeals is unexceptional. Because the petition for certiorari presents nothing resembling a substantial Federal question, review obviously should be denied.

STATEMENT OF THE CASE

The Fifth Circuit has dealt with this case on three separate occasions. The opinion which the petition for certiorari attempts unsuccessfully to disparage, Bruce v. Estelle, 536 F.2d 1051 (5 Cir., 1976), was preceded by two other opinions remanding the cause for further development of the facts. Bruce v. Estelle, 483 F.2d 1031 (5 Cir., 1973); Bruce v. Beto, 396 F.2d 212 (5 Cir., 1968). The monumental evidence of Respondent's mental incompetence at his trial in 1965, less than nine months after he was adjudged mentally ill and committed to a State institution, is exhaustively analysed in these opinions and need not be restated.

ARGUMENT

Apparently counsel for the Petitioner would have the Court believe that the Fifth Circuit casually and irresponsibly reversed the District Court simply because the Petitioner's evidence was quantitatively inferior to the Respondent's (Petition for Certiorari, p. 4), and because the Respondent's erratic behavior in the courtroom was given virtually conclusive weight (Petition for Certiorari, p. 8). This view of the matter is, with deference, nonsensical.

What actually happened is that, after providing the State of Texas with every conceivable opportunity to refute the overwhelming evidence of incompetence generated in protracted State and Federal evidentiary proceedings, the Court of Appeals finally concluded, in a painstakingly constructed opinion prepared by one of its most distinguished Judges, that on the entire record the District Court's decision to the contrary was clearly wrong and that the Respondent was mentally incompetent at trial. The testimonial and documentary evidence on both sides of the issue was meticulously and exhaustively

considered. If there were ever a case in which a Court of Appeals were justified in concluding that it was not bound by the disposition of a cause by the District Court, this is it.

There are, of course, alternative grounds sustaining the Fifth Circuit's decision. A retrospective judicial determination of the competence issue almost a decade after trial, totally unsupported by any psychiatric evaluation contemporaneous with trial and dependent in large measure upon "information contained in the printed record," Pate v. Robinson, 383 U.S. 375, 387 (1966), is, in the peculiar circumstances of this case, a constitutionally impermissible substitute for the hearing that should have been accorded to the Respondent in 1965. Cf. Drope v. Missouri, 420 U.S. 162, 183 (1975); Dusky v. United States, 362 U.S 402 (1960). And, since the determination of the competence issue involves so-called "mixed questions of law and fact," the judgment of the Court of Appeals is supportable on the independent ground that Rule 52 of the Federal Rules of Civil Procedure and the "clearly erroneous" rule are simply inapplicable to the resolution of an ultimate constitutional issue. In such circumstances a reviewing court is required to apply governing constitutional principles "upon the basis of an independent review of the facts of [the] case." Jacobellis v. Ohio, 378 U.S. 184, 189 (1964); Norris v. Alabama, 294 U.S. 587, 590 (1935); Watts v. Indiana, 338 U.S. 49, 51 (1949); cf. Townsend v. Sain, 372 U.S. 293, 318 (1963). The Fifth Circuit here rejected no findings of either the Federal District Court or the State Trial Court with respect to operative or evidentiary facts, "in the sense of a recital of external events and the credibility of their narrators," Brown v. Allen, 344 U.S. 443, 506 (1953), but merely rejected the ultimate legal conclusion that such facts established that the Respondent had at trial "sufficient present ability to consult with his lawyer

with a reasonable degree of rational understanding and * * * a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960). Such "tough individual problems of constitutional judgment," Roth v. United States, 354 U.S. 476, 498 (1957), have always been within the province of a United States Circuit Judge.

These matters aside, there is clearly nothing about this case that could conceivably warrant review by this Court. No new constitutional principle has been announced or applied. No striking departure from previous decisions has been undertaken. The disposition of this cause by the Fifth Circuit has had and will have no impact whatever upon the administration of criminal justice generally. The facts are unique. Hopefully, they will never arise again.

Unless (as the petition for certiorari obliquely suggests) Federal District Judges are invariably to be regarded as conclusive arbiters of claims of mental incompetence, leaving the Courts of Appeals to rubber-stamp their decisions on the issue, the Fifth Circuit correctly disposed of this case. Eleven years, 22 Judges and three appeals after the fact, that should end it.

CONCLUSION

For the foregoing reasons, Respondent Robert Vernon Bruce respectfully suggests that the petition for certiorari should be denied.

Respectfully submitted,

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